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Supreme Court of the United States

OCTOBER TERM, 1948

INGRAHAM A. STAINBACK, ET AL.,
Petitioners,
against
MO HOCK KE LOK PO, ET AL.

No. 52

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.
OSMOND K. FRAENKEL,
Counsel.

Of Counsel:
MURRAY A. GORDON,
FRANK E. KARELSEN, JR.,
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This brief is submitted in support of the position of respondents herein with the consent of the parties. The American Civil Liberties Union is a non-partisan, non-profit organization devoted to the protection and furtherance of civil liberties. It has no affiliation of any kind with any of the parties to this action and is interested in this case solely because it believes that it presents far reaching problems in the field of academic freedom which has for many years been among the prime concerns of the American Civil Liberties Union.

Argument

The facts herein are adequately stated in the briefs of the parties hereto and need not be repeated except to state that the action involves the constitutionality of Chapter 31 of the Hawaiian Revised Laws. That legislation forbids any Hawaiian child to be taught a foreign

language in any school unless he shall either have passed the first four grades of a public or private school and shall thereafter in each succeeding grade attain a certain score in "a standard test in English composition and reading", or he shall have passed the eighth grade, or he shall have attained the age of fifteen years (Hawaiian Rev. Law, Section 1873). This brief is concerned only with the constitutionality of the aforesaid statute and not with any of the other procedural or jurisdictional points which may be raised upon this appeal.

The respondent educational institutions have standing to assert the unconstitutionality of the statute since it impairs respondents' property right to render educational services. *Meyer* v. *Nebraska*, 262 U. S. 390; *Bartels* v. *Iowa*, 262 U. S. 404. The standing which thus accrues to respondents authorizes them to urge not only the right to maintain a foreign language educational institution, but also whatever constitutional rights parents may have to send their children to respondents' schools. *Pierce* v. *Society of Sisters*, 262 U. S. 390; cf. *Truax* v. *Raich*, 239 U. S. 33; *Truax* v. *Corrigan*, 257 U. S. 312; *Buchanan* v. *Warley*, 245 U. S. 60.

The "right thus to teach and the right of parents to engage [for the instruction of] their children, we think, are within the liberty of the [Fourteenth] Amendment." *Pierce* v. *Society of Sisters*, 262 U. S. 390, 400. "The Fourteenth Amendment, as now applied to the States,* protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discre-

* The liberties guaranteed by the Fourteenth Amendment are here preserved under the Fifth Amendment from encroachments by territories of the United States or subdivisions thereof. *Farrington* v. *Tokushige*, 273 U. S. 284.

tionary functions, but none that they may not perform within the limits of the Bill of Rights." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637. Accordingly, the statute here in issue is to be tested by the standards applicable to any legislation restrictive of civil liberties. Upon a weighing of the "circumstances" and an appraisal of "the substantiality of the reasons advanced" in support of the statute (*Schneider* v. *New Jersey*, 308 U. S. 147, 161; *Thornhill* v. *Alabama*, 310 U. S. 88, 95), the legislation must be held unconstitutional as determined by the District Court of Hawaii (*Mo Hock Ke Lok Po* v. *Stainback*, 74 F. Supp. 852).

Schooling of children in a private foreign language school after regular school hours involves no threat to the public safety or welfare. The subject matter taught and learnt at such a school contains no dangerous doctrine. It is the peaceable material which may be found in any regular elementary school curriculum. Nor does it appear that the statute's scope is dependent upon the competency of the instruction at the affected schools. The single justification for the statutory abridgment of the right of respondents to teach and the right of students to learn foreign languages as well as the right of parents to choose the instruction to be accorded their children is the purported effect upon pupils resulting from the study of foreign languages after regular school hours.

In *Meyer* v. *Nebraska, supra*, this Court held unconstitutional a Nebraska statute which forbid foreign language teaching to students who had not passed the eighth grade. The purpose of the statute there was "to promote civic development by inhibiting training and education of the immature in foreign languages and ideals before they could learn English and acquire American ideals", *Meyer* v. *Nebraska, supra*, at p. 401. In the case at bar a similar

statute is involved, but this time the stated purport of the law is to aid school children of average intelligence in their English language studies; and to avert "serious emotional disturbances, conflicts and maladjustments." Hawaiian Rev. Law, §1871.

It is submitted that the justification for the impairment of civil rights is constitutionally insufficient here as it was in *Meyer* v. *Nebraska*. If instruction in a foreign language after regular school hours is "emotionally disturbing" to children of average intelligence, such disturbance must be evaluated with regard for the basic social and constitutional premise that the rearing of children in our society is left to parents and not to the state. Certain minimum standards of education and child care may be and are prescribed by the public authorities (see *Meyer* v. *Nebraska*, *supra*, at p. 402), but beyond those minima state paternalism is not the rule. Consequently, although the pedagogical problem which concerned the Hawaiian legislature may be conceded to exist, that problem must be resolved by legislation which affirmatively improves the teaching and reception of the English language rather than by legislation which circumscribes another body of cultural endeavor. This conclusion is impelled not only by the constitutional right to teach and to learn subjects which are innocuous to society, and the constitutional right of parents to send their children to educational institutions chosen by those parents, but by the further obvious circumstance that if "emotional disturbances" of the nature here involved could bottom restrictions upon parents' government of the education of their children, then very grave threats would ensue to the instruction of children in unorthodox religious, social and political doctrines which must frequently cause "serious emotional disturbances, conflicts and maladjustments." It does not require ex-

tended argument to establish that, if, legislation of the character under consideration were permitted to exist, in vast areas of this country the teaching of biology, the theory of evolution, indeed the truths of the equality of man and in many instances the basic tenets upon which this nation was founded, could be eliminated from the body of permissible education upon legislative findings that to teach these beliefs would make for "emotional disturbances," or similar vague and indefinable consequences to persons of such age as the legislature might "reasonably" determine.

In any event, to the extent that the justification proffered for the legislation is constitutionally sufficient, the legislation cannot exceed its justification. *Thornhill* v. *Alabama*, 310 U. S. 88, 99. Thus, the statutory scheme is predicated upon the effect of afternoon foreign language instruction upon children of average intelligence, yet the scope of the statute encompasses all Hawaiian children. Legislation impairing civil liberties must, on its face, be confined to the cause for that legislation. *Thornhill* v. *Alabama*, *supra*; *Thomas* v. *Collins*, 323 U. S. 516; *Lovell* v. *Griffin*, 303 U. S. 444. The statute would forbid students of above-average intelligence from obtaining foreign language instruction which might benefit rather than retard them. Such a loosely drawn statute is an unnecessary and an unconstitutional impairment of the right of parents freely to choose the educational institution to which they will send their children.

CONCLUSION

The judgment should be affirmed and Chapter 31 of the Hawaiian Revised Laws held to be unconstitutional.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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